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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DONALD EUGENE BYBEE, Defendant and Appellant.	D056642 (Super. Ct. No. RIF139205)

APPEAL from a judgment of the Superior Court of Riverside County, Richard J. Hanscom, Judge. Affirmed. (Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.)

After two jury trials, Donald Eugene Bybee was convicted of unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)) and misdemeanor hit and run (Veh. Code, § 20002, subd. (a)).[1] The trial court subsequently found that Bybee had suffered

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1 In addition to finding Bybee guilty of the misdemeanor offense at the first trial, the jury acquitted him of transportation of methamphetamine (meth) (Health & Saf. Code,

five prison priors (Pen. Code, § 667.5, subd. (b)) and two strike priors (Pen. Code, §§ 667, subds. (c) and (e)(2)(A) and 1170.12, subd. (c)(2)(A)). After denying Bybee's motions for a new trial and to dismiss a strike prior, the court granted his motion to strike the prison priors and sentenced Bybee to prison for 25 years to life.[2]

Bybee appeals, contending the trial court prejudicially erred in denying his request for a new trial following the jury's improper use of facts and exhibits not in evidence to convict him, in improperly permitting a police witness to express the opinion that he was the driver of the stolen vehicle, and in arbitrarily and improperly limiting his counsel's ability to examine prospective jurors. Bybee also claims the purported expert testimony regarding the ultimate question of his guilt and the improper interference with jury voir dire violated his federal constitutional right to a fair trial. Finding no prejudicial error, we affirm.

FACTUAL BACKGROUND[3]

In late September 2007, April Stinson reported to the police that her 2006 Nissan Xterra had been stolen. On October 7, 2007, Riverside Police Department auto theft Detective Alan Danzek, who was checking a hot sheet of stolen vehicles, saw the Xterra,

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§ 11379, subd (a)). The jury acquitted Bybee of simple possession of meth (Health & Saf. Code, § 11377, subd (a)) and of receipt of a stolen vehicle (Pen. Code, § 496d, subd. (a)) after the second trial.

2 The court had earlier sentenced Bybee to 30 days in jail for the hit and run, with credit for time served.

3 Because Bybee raises no issues regarding the first trial, and does not challenge the sufficiency of the evidence to support his convictions, we briefly set out the facts from the second trial as background for our discussion of Bybee's contentions on appeal.

which matched one of the cars on the list, near Mission Inn Boulevard and Brockton in Riverside. As he began to follow the Xterra, it immediately pulled into an alley. After Danzek drove into the alley, the Xterra sped up, as if to evade him. As he continued to follow the Xterra, Danzek observed that the front and rear plates on the car did not match, and that the rear plate was for a commercial vehicle. Danzek activated his lights and siren, and, after a short two block chase, the Xterra crashed into a parked car on a street nearby.

When the driver got out of the Xterra and fled, Danzek stopped his car, grabbed his radio and ran after him, broadcasting a general description of the fleeing suspect ahead of him. The white male, who was wearing a white baseball cap with black on the front and a gray shirt, ran across someone's yard, fell down, got back up and continued running into the residential area before Danzek lost sight of him. As Danzek retraced his steps to the crashed Xterra to await assistance from other officers, he found a tin containing 0.49 grams of meth about six feet away from the driver's door.

A number of other Riverside police officers then arrived at the crash scene, sealed off the residential block and searched the area. Within 20 minutes other officers, who had received a description of the driver from Danzek, found a man matching that description in an outdoor water heater closet or shed that opened onto an alley, hiding in a fetal position on the ground under a painter's cloth. The man, who had a shaved head, was wearing a gray button-up shirt, was sweating profusely, and had a white with black emblem baseball cap near him. A search of the man turned up a wallet containing

documentation identifying him as Bybee and also as a member of a motorcycle group. Danzek identified Bybee at the location he was found as the driver of the crashed Xterra.

After Bybee's arrest and transport to the police station, he was unable to get out of the police car and told the transporting officer he had injured his knee that afternoon while running. Meanwhile during a search of the Xterra at the crash scene, officers found a "dent puller," commonly used to remove a vehicle's ignition in addition to removing dents from vehicles, under the front passenger seat, and two black motorcycle helmets in the backseat. No usable fingerprints were found at the scene.

In addition to the above evidence being presented at Bybee's second trial, two residents in the sealed off area testified to what they saw regarding the incident. Susan Ewald testified that on the day of the crash she saw a thin male in a long-sleeved flannel-like button-down shirt who was wearing a baseball cap and long pants, either Levis or jeans, running through her back yard and jumping over her fence into the next yard. She identified the shirt in exhibit 44A and the baseball cap in exhibit 3, which were found with Bybee at the time of his arrest, as being consistent with the clothing she saw on the man running across her backyard. She did not see the man's face as he was running away from her view.

Johnny Ruiz, who went outside to his porch after hearing the crash that day, also saw a man "running from the cops" across his yard, saw him fall, get up and then keep running. Ruiz said the officer with a cell phone chasing the man also fell in the yard and that he later found a lighter in his front yard.

Danzek further testified at the trial as an expert on drugs regarding the meth found near the crashed Xterra and as an expert on auto theft. He opined that the amount of meth in the tin was a usable amount. He listed the facts to consider in determining whether a vehicle was stolen and gave an opinion that Bybee was the person he saw driving the Xterra. Although Danzek had not gotten a good view of Bybee's face either while he was driving or running away from him, he had a "rough impression" of his face when he got out of the car and ran. On cross-examination, Danzek conceded he did not see Bybee's mustache, that the first time he got a good look at his face was near the water heater shed where other officers had detained him, and that he assumed Bybee was the driver. Danzek noted that no one else had been detained or caught hiding in the cordoned off area that day.

DISCUSSION

I

ADMISSION OF PANTS

Following the jury's verdict, Bybee filed a motion for a new trial under Penal Code section 1181, subdivision (2), on grounds the jury had received evidence during its deliberations that "was never introduced into evidence and should have never been seen by the jury." In support of the motion, Bybee's counsel submitted a declaration stating that when he talked with the jury after the verdict was in, the jury foreperson told him "they had a real hard time with the issue of identity . . . until they looked at the pants, which were Exhibit number 44, and the[y] saw the grass stains on the pants . . . ." Counsel noted that no one had testified at trial "to the receipt or collection of any pants,

to any grass stains being on the pants, or to whether [or] not any such pants were somehow related to Mr. Bybee." Counsel claimed that the exhibit was either inadvertently or erroneously given to the jury, arguing it was erroneously admitted into evidence because it was not introduced at trial and was without any foundation. The prosecutor opposed the motion on grounds the evidence had properly been admitted and the issue had been waived by the failure to timely object to such admission.

At the beginning of the hearing on the matter, the court indicated it would only consider that portion of counsel's hearsay declaration about what the jury did, but would not consider the jury's thought processes as to what led to a verdict and would strike that portion as not properly before the court. The court also noted it had requested exhibit 44 be brought to the court and had reviewed the court minutes, which reflected that exhibit 44 had been admitted into evidence at trial.

Bybee's counsel submitted on the court's characterization of his declaration, but stressed that at trial he had challenged the pieces of clothing that came into evidence relative to Bybee and that the pants "never came in." As a result, the pants "were not subjected to cross-examination [or] confrontation[and] as a matter of due process [counsel was] requesting a new trial on the matter."

Although the prosecutor conceded there had been no testimony concerning the pants at trial, he pointed out that "[a]t no time was there any objection in regards to [the pants as an exhibit on the list provided by the People.]" Because there was no objection to the pants in exhibit 44 when the items were admitted into evidence, the prosecutor argued the issue was waived. In addition, he asserted counsel's declaration was

inadmissible hearsay and even if accepted as true, there was no evidence of any prejudicial effect caused by the admission of the pants.

The court denied the motion, stating it was assuming the minutes show that the exhibit in question was received in evidence. Although the court also assumed that the jury did consider the pants in its deliberations, it could not see how the pair of pants "would prejudice in any way this case," because the jury had acquitted Bybee of the charge for the drugs found near the vicinity of where the man running across the lawn had fallen.

After the court had sentenced Bybee, exhibit 44 was brought into the court and a brief recess was taken to look at the pants. Back on the record, the court stated the exhibit tag showed that the pants had been received into evidence and noted that after looking at them, there "on the front some what could be described as grass stains. They could be something else too. But certainly one could look at them and . . . think that." The court, however, did not see how the pants exhibit, even if improperly received, would be prejudicial. The court clarified that it believed the pants exhibit had been "properly received."

On appeal Bybee contends his conviction for auto theft should be reversed because the trial court erroneously denied his motion for a new trial based on the jury having improperly used exhibit 44 to convict him when that exhibit had not been introduced into evidence. However, as the above record plainly reflects, the pants exhibit was admitted into evidence without objection and the trial court impliedly denied the new trial motion on such basis, essentially finding the issue waived.

With regard to a new trial motion, "[a] trial court may grant a motion for new trial only if the defendant demonstrates reversible error." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159.) "On appeal, a trial court's ruling on a motion for new trial is reviewed for abuse of discretion. [Citation.] Its ruling will not be disturbed on appeal ' "unless a manifest and unmistakable abuse of discretion clearly appears." [Citation.]' [Citation.]" (*Id*. at pp. 1159-1160.) Here, Bybee has failed to show that the court's denial was " 'outside the bounds of reason' under the applicable law and relevant facts [citations]." (*People v. Williams* (1998) 17 Cal.4th 148, 162.) Although there had been no foundational testimony concerning the pants in exhibit 44 at trial, they had been marked as an exhibit for trial and were admitted along with other exhibits at the end of the prosecution case without objection. Thus they did not qualify as extrinsic evidence "received out of court" for purposes of satisfying Penal Code section 1181, subdivision (2), which provides that a court may grant a new trial "[w]hen the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property."

Further, Bybee's failure to object to the introduction of the jeans on any grounds, including relevancy, lack of foundation, authentication, chain of evidence, constitutional violations, etc., in a timely manner procedurally barred him from asserting any of those contentions on his new trial motion as well as precludes him now from asserting the same

claims on appeal.[4] (Evid. Code, § 353; *People v. Farnam* (2002) 28 Cal.4th 107, 159.) We thus decline to consider on appeal Bybee's assertions that the trial court improperly admitted the pants in exhibit 44. Nor need we address his additional arguments regarding the admissibility of his counsel's declaration under Evidence Code section 1150 for purposes of the new trial motion or whether there was any prejudice in the event the evidence had been improperly admitted. Accordingly, on this record the trial court did not err in denying the new trial motion.

II

IMPROPER LAY OPINION

During Detective Danzek's testimony, the prosecutor asked some questions concerning his expertise as an auto theft investigator, including what factors he looked at in deciding whether a car was stolen. After Danzek listed factors such as looking at the license plates, for signs of entry, for damage to the ignition or for other evidence of attempts to start the vehicle without the key, and for tools used in such crimes, the prosecutor asked Danzek whether given the totality of the circumstances in this incident he had any opinion as to whether the Xterra was a stolen vehicle. Before he could answer, the court sustained defense counsel's objection that the question was asking for an improper opinion.

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4 We do not understand the Attorney General's response, which essentially concedes there was no basis for admitting the pants into evidence and portrays the new trial motion as having been made on grounds of juror misconduct. The concession is contrary to the record and position taken by the People below that the pants as part of exhibit 44 were properly admitted into evidence without objection and recognized that the jury had not been accused of any misconduct in the new trial motion.

The prosecutor then asked Danzek if he had "any issue as to whether or not the defendant was the person you saw in the vehicle?" After the court sustained an objection to the question being vague, the prosecutor asked Danzek whether Bybee was the person he had seen in the Xterra. When the court overruled objections that the rephrased question called for speculation, an improper opinion and was irrelevant, Danzek replied:

> "Based on the totality of the investigation -- I saw the guy that was driving the stolen car; I saw him leave the car; I saw him run away, fall down, continue to run; I had him in plain sight that whole time; I talked to people that tracked his path and course when he was fleeing; and I know where the suspect, the defendant, was found. Based on the totality of the circumstances and the consistencies involved in all this, it's my opinion that Mr. Bybee was the driver of the stolen vehicle."

The court overruled defense counsel's objection and motion to strike Danzek's answer as an improper opinion that lacked foundation.

On appeal Bybee essentially contends the trial court abused its discretion in overruling his counsel's objection to Danzek's improper "expert" opinion identifying Bybee as the driver of the Xterra. He also filed a supplemental brief alleging that the improper admission of Danzek's opinion denied him his constitutional right to a fair trial. We find no prejudicial error.

In general, Evidence Code section 800 permits a witness who is not testifying as an expert to testify in the form of an opinion "as is permitted by law, including but not limited to an opinion that is: [¶] (a) [r]ationally based on the perception of the witness; and [¶] (b) [h]elpful to a clear understanding of his testimony." (*Ibid.*) "Lay opinion testimony is admissible where no particular scientific knowledge is required, or as 'a

matter of practical necessity when the matters . . . observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner.' [Citations.]" (*People v. Williams* (1988) 44 Cal.3d 883, 915.) "Matters beyond common experience are not proper subjects of lay opinion testimony." (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1333.)

On the other hand, Evidence Code section 801 provides that if the witness is testifying as an expert, "his testimony in the form of an opinion is limited to such an opinion as is: (a) [r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) [b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (*Ibid.*; see *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651 (*Killebrew*).) An expert may properly give an opinion in court even though it "embraces the ultimate issue to be decided by the trier of fact." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972; Evid. Code, § 805.) However, an expert is not permitted to express an opinion he or she may have that "a specific individual had specific knowledge or possessed a specific intent" (*Killebrew, supra,* 103 Cal.App.4th at p. 658), or about "a specific defendant's subjective expectation." (*Ibid.*) Further, an expert should not render an opinion " 'which amounts to no more than an expression of his general belief as to how the case should be

decided . . . . There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision.' [Citation.]" (*Summers v. A. L. Gilbert Co*. (1999) 69 Cal.App.4th 1155, 1182-1183.)

The Evidence Code also provides that "[a] witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." (Evid. Code, § 802.)

Here, Danzek's testimony that Bybee was the driver of the Xterra who had fled after the crash was essentially opinion testimony regarding identification, which is normally properly given by a lay witness. The problem is, however, that Danzek testified both as a lay witness and as an expert witness at trial. Although he was properly asked the question regarding the identity of the person he saw driving the Xterra as a percipient "lay" witness (Evid. Code, § 702), his response appears to have been couched in terms of giving an expert opinion. Because only a portion of his answer was based on his own perceptions, a reasonable jury may not have understood that he was testifying merely as a percipient witness and not as an expert with regard to Bybee's identity as the driver of the stolen Xterra. We therefore believe the court abused its discretion in failing to at least strike the portions of Danzek's answer that were based on information derived from others and not on his own observations.

As to those portions, which generally referred to what Bybee learned from other witnesses, presumably Ewald and Ruiz whose yards Bybee had run through, and from other police officers who had found Bybee hiding under a painter's tarp in a water shed nearby, the information was already before the jury through the testimony of others and as such was evidence from which the jury could sufficiently reach its own conclusion on the issue of identity of the driver of the crashed Xterra. Though the jury might have interpreted those parts of Danzek's reply as merely explaining the basis of his opinion, i.e., such was based not only on his own observations, but also on information he obtained from witnesses and other police officers who later found Bybee, the jury could just as easily have understood such as conveying Danzek's "expert" belief as to how the issue of identity should be decided, which would be improper.

Although it is unfortunate that Danzek phrased his reply to the identity question in the manner that he did, we do not find his brief statement of opinion prejudicial to Bybee when viewed in the totality of the evidence at trial. At no time did Danzek express an opinion about Bybee's actual guilt or about his specific intent with regard to the crimes charged. Nor did he purport to base his opinion on some scientific or specialized knowledge unavailable to the jury which might give it an "undeserved aura of certainty." (See *People v. Stoll* (1989) 49 Cal.3d 1136, 1156.) As noted above, the jurors had all the evidence on which Danzek relied for the improper portion of his opinion before them. In addition, defense counsel strenuously cross-examined Danzek as to his limited observations of the man who had run from the Xterra and the court fully and correctly instructed the jury on how to evaluate eyewitness identification testimony and how to

assess expert and lay opinion testimony, specifically telling the jurors they were not required to accept such opinions as true but could decide what weight to give them based on their review of the evidence. We presume the jury followed such instructions. Thus based on this record, we cannot find it reasonably probable that a result more favorable to Bybee would have been reached in the absence of the improper portion of Danzek's opinion. (*People v. Watson* (1956) 46 Cal.2d 818, 834-838.) No prejudicial error is shown.

III

IMPROPER LIMITS ON JURY VOIR DIRE

In limine, the trial judge noted for the record that regarding the process of selecting the jury for this case, he would first seat 18 people, voir dire them himself and then give each counsel 15 minutes to conduct further voir dire of those 18. The judge would then take a sidebar break for any challenges for cause and then peremptory challenges. If more than six people were excused from the first group, the judge would seat six more people, ask them if they had heard his questions and if their answers would be any different, and then "give them an opportunity to answer any and all questions that have been propounded. And I will not allow any further voir dire by parties at that stage after . . . we've gone through the first 18."

Defense counsel immediately objected to the court's suggested procedure for voir dire, noting this was essentially a life case because of Bybee's prior strikes, and arguing he did not know how he could "adequately judge or select a jury unless [he could] have the opportunity to at least speak with the other jurors, the new jurors who are put in the

box after we've made our peremptories." Counsel then asked the court to give counsel more time, at least five minutes each, for the new jurors, and further objected to only having 15 minutes for the first 18. The prosecutor joined in the defense objections.

In response, the trial judge explained that it would separately ask each juror the general information about where they live, their family situation, their occupation and their prior jury service. Because it had been his experience that voir dire by counsel had largely been used "for indoctrination of whatever their supposed points are," the judge thought 15 minutes was sufficient for that. Nonetheless, he noted he was willing to hear from counsel if either thought they wanted to ask one question or something to clarify some issue upon hearing something out of the ordinary with regard to the new jurors. The judge stated that counsel just needed to let him know, "it seems reasonable, I wouldn't object to that. I'm giving you that out."

The record reflects that jury selection was reported but not transcribed. The minutes concerning jury selection show that the court and counsel conferred several times sidebar regarding certain prospective jurors and that a defense motion was brought and denied before the jury was empaneled.

Bybee complains on appeal that the trial judge's limits upon the parties' examination of the prospective jurors was arbitrary and unfair in light of the complex nature of this three strikes case. In a supplemental brief, he also asserts the trial judge's improper interference with jury voir dire to ensure impartial jurors violated his federal constitutional right to a fair trial. No error or abuse of discretion appears.

As the People point out in their respondent's brief, Bybee has failed to provide a record of the voir dire. Nor has he requested that the record be augmented with the transcripts of the voir dire. Without such record, it cannot be determined whether the trial judge actually followed the procedure it had originally stated would be limited, whether the judge denied counsel any further questioning of prospective jurors if requested, or whether either alleged deficiency impacted the judge's duty to ensure the fair and impartial selection of the jury. Because Code of Civil Procedure section 223 provides the trial court with wide "discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause," no conviction will be reversed based on the court's exercise of its discretion in such procedure unless it "has resulted in a miscarriage of justice . . . ." (*Ibid.*; *People v. Carter* (2005) 36 Cal.4th 1215, 1250-1251 (*Carter*).) Bybee has made no showing as to what happened in voir dire or that it resulted in a miscarriage of justice.

As our Supreme Court has observed, "the adequacy of voir dire is a matter ' " 'not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and responses to questions.' " ' [Citations.] The applicable standard is a demanding one: 'Unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not

a basis for reversal. [Citation.] A fortiori, the same standard of reversible error applies when both the court and counsel participate in the voir dire.' [Citations.]" (*Carter, supra*, 36 Cal.4th at pp. 1250-1251.)

Here, although the restricted procedure for voir dire set out by the trial judge may appear at first blush to have been insufficient "to its purpose of ferreting out bias and prejudice on the part of prospective jurors" (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314), there is nothing in the record before us to show that any actual questioning of the jury was inadequate or meaningless to reveal potential bias.[5] Nor is there any evidence that either counsel approached the bench as invited to do so to suggest further questioning of the jury panel or any particular juror or jurors and was refused. From the lack of such evidence we can infer that the questioning was sufficient and "that each [counsel] was satisfied with the impartiality of the jury on all pertinent issues . . . ." (*Id*. at p. 1317.) Because "[t]he right to voir dire, like the right to peremptorily challenge, is not a constitutional right but a means to achieve the end of an impartial jury" (*People v. Wright* (1990) 52 Cal.3d 367, 419), and the trial judge gave the parties the opportunity to request further questions for voir dire, we conclude that the time limits of which Bybee complains have not been shown to have prevented his trial counsel from making

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5 Although we cannot fully examine the effects of the trial judge's limitations on voir dire due to the absence of an adequate record, we do express dismay at the arbitrary nature of the proposed limitations. Fifteen minutes to examine 18 jurors appears utterly arbitrary and insufficient in many cases. The provision of *no time* to question replacement jurors cannot rationally be justified. Unfortunately, we do not know if the arbitrary limits were enforced, or whether prejudice resulted.

reasonable inquiries into the fitness of prospective jurors to serve on the jury. (See *Carter, supra*, 36 Cal.4th at p. 1251.)

Moreover, even were we to assume that the trial judge abused his discretion in restricting voir dire, Bybee has failed to show prejudice. He has not pointed to anything in the record to show that he was dissatisfied with the jury as sworn or to show that any juror was incompetent or not impartial. That both counsel objected to the court's restrictive voir dire process suggests that it "did not disproportionately impact one side to the advantage of the other." (*Carter, supra*, 36 Cal.4th at pp. 1251-1252.) No miscarriage of justice is shown.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.